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IN THE

Supreme Court of The United States

OCTOBER TERM, 1972

No. 73-245

NICK DRASKOVICH, Et Al.,
Petitioners,

vs.

NOVAK PASALICH, Et Al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above-entitled case on May 7, 1973.

REFERENCE TO OPINIONS BELOW

An opinion under date of August 8, 1968, of the Judge of the Circuit Court of Elkhart County has not been officially reported. It is presented in Appendix, *infra* p. 13, and, as printed, embodies the Order.

An opinion under date of March 20, 1972, of the appropriate Court of Appeals of Indiana is reported at 280 NE 2d 69. It is presented in Appendix *infra* p. 17, and, as printed, embodies the Order.

A ruling under date of August 11, 1972 on present Petitioner's motion for reconsideration by the Court of Appeals has not been reported. It is presented in Appendix, *infra* p. 41, and, as printed, embodies a dissenting opinion.

JURISDICTIONAL STATEMENT

Pursuant to Indiana practice, there was simply endorsed on the original of present Petitioner's Petition to Transfer to the Supreme Court of Indiana a denial of this discretionary appeal on May 7, 1973, notice of which was immediately transmitted to all counsel. (App. p. 43)

This was a final judgment of the highest court of Indiana in which a decision could be had. It allowed to stand an order of the Indiana Court of Appeals believed to be in contravention of the First and Fourteenth Amendments to the Constitution of the United States.

Jurisdiction is invoked under 28 U.S.C.A. 1257(3).

QUESTION PRESENTED

Is this a correct interpretation of the Constitutional law of this country as set forth in *Presbyterian Church in the United States versus Mary Elizabeth Blue Hull* 393 U.S. 440, and *Maryland and Virginia Eldership versus Church of God at Sharpsburg,* 396 U.S. 367. "Confronted with the necessity to resolve a dispute about the use of church property, where it is admitted that the local church has governing by-laws and that the Diocese and the Mother Church both have governing written constitutions, a civil court is precluded from enforcing those aspects of those documents which in secular language set forth the bases for control over church property because those multi-faceted documents contain religious reference."

CONSTITUTIONAL PROVISIONS

The constitutional provisions which petitioner contends have been violated by the judgment of the Court of Appeals of the State of Indiana are the following:

Amendment I of the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

Amendment XIV of the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE AND PRESENTATION OF THE FEDERAL QUESTION

One of the many autocephalous Eastern Orthodox Churches is the Serbian Church, having its See in Belgrade, with a Diocese in the United States and Canada, headed by a bishop. In 1963 Belgrade took action which they believed (and believe to this day) resulted in the suspension and defrocking of the Bishop, and in the dissolution of the Old Diocese and the creation of three new ones.

Furor ensued in the Serbian communities of this country and Canada, resulting in multiple litigation. One of those cases has twice been before this Court, *St. Demetrius v. Kelemen*, 393 U.S. 527. Certiorari granted and remanded for further consideration in light of *Mary Blue Hull*. The same case, 400 U.S. 827. Certiorari denied. (The under-

signed was counsel for petitioner in the first and for respondent in the second.)

By 1966 it had become apparent in South Bend that the probable majority of the congregation wished to leave the Old Diocese and go with the new structures. Present petitioners initiated this action in the Elkhart Circuit Court, seeking an injunction against the diversion of the church property from its historical purpose. The trial court, after eight weeks of testimony, issued an order (Appendix p. 15) carefully avoiding any determination of ecclesiastical questions and reciting simply, that, "The South Bend Church is a part of the Serbian Eastern Orthodox Diocese of the United States of America and Canada," and, "That the defendants (respondents here) have dissolved their allegiance to the Serbian Eastern Orthodox Diocese of the United States and Canada, and have transferred their allegiance and loyalty to a newly established diocese."

Appeal was taken. As is permissible under Indiana Procedure, an attempt was made to bypass the intermediate or appellate court and to have the Indiana Supreme Court review the Constitutional questions. In January of 1972 the Supreme Court of Indiana declined review in that immediate fashion. In March of 1972, the Indiana Court of Appeals issued an opinion in this case (Appendix p. 17) 280 NE 2969 reversing the trial court and awarding control of the property to the defendants (respondents here) on the basis of their "loyalty to the Mother Church".

Petition for rehearing was filed with the Court of Appeals, and ruled on (Appendix p. 41) by the same judges who wrote the March '72 opinion. One of them partially reversed himself and recited that hearing ought to be granted on the basis of an opinion of the Supreme Court

of Ohio 21 O.S. 2d 154. That opinion is the direct result of this Court's remand of 393 U.S. 527.

Appeal was taken to the Supreme Court of Indiana which was denied on May 7, 1973, without opinion. (App. p. 43)

There was no federal question presented when the circuit court made its determination on the basis of written secular documents establishing administrative links with the Diocese, an Illinois corporation. Only when the Court of Appeals awarded control of the property to defendants on the basis of their spiritual loyalty to the Mother Church, a loyalty powerful enough to transcend the local by-laws and Diocesan Constitution, was the federal question raised.

First in the petition for rehearing to the Court of Appeals (resulting in the partial reversal described above) and then again in its "Petition to Transfer to the Supreme Court of Indiana" present petitioners have asserted that the civil courts of Indiana may not award control over the use of the South Bend Church on the basis of their determination of disputed questions about the internal allocations of power within the church structure.

Petitioner is then appealing from the opinion and order of the highest court of the State of Indiana from which an opinion was, or could have been obtained, and is now presenting to the Court its Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

In an attempt to make this petition as clear and cogent as possible, this writer, as a working aid, reviewed his previous successful petition involving the same controversy. Much of the type of argument then made is no longer necessary. After *Mary Blue Hull* and *Sharpsburg*, it is obvious that all aspects of the First Amendment

through the Fourteenth Amendment are applicable to state court proceedings. Yet, it is not obvious—not obvious in Indiana.

In an attempt to eludicate the meaning of *Mary Blue Hull* Mister Justice Brennan in January of 1970 in *Maryland and Virginia Eldership versus Church of God at Sharpsburg* 396 U.S. 367, 368 ff. wrote a separate concurring opinion. Prior to analysis of the Indiana opinion from which appeal is here being taken, this writer had assumed the following two sentences from Mr. Justice Brennan's opinion to be central to any resolution of church property disputes: "To permit civil courts to probe deeply enough into the allocations of power in a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determinations of religious doctrine. Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy."

The Justices of this court will make their own determinations about the meaning and impact of the opinion thought to be erroneous. As it is read it becomes clear that the Indiana Court of Appeals felt that the basis of the decision of the trial court was that court's decision that Belgrade could not abolish the Old Diocese and create three new ones. The circuit Judge did not make such a determination. (App. p. 13-16) Implicit in his ruling is an acceptance of the new dioceses. He simply ruled that the church property was dedicated by documents in evidence to the use and control of the Old Diocese and that those wishing to switch the use of the church property to the new dioceses could not. This determination was obviously on the basis

of Article 4 of the Diocesan Constitution (Appendix p. 22) which says that the Church is a member of the Diocese and Article 2 of the local Church's by-laws (Appendix p. 28) which says that the S. Bend Church belongs to the Diocese.

These are formally adopted rules governing this church and its component parts—plain language—and the trial court judge issued an injunction enforcing these documents in the same fashion as he might have done in a dispute about control of property arising in the context of a labor union dispute, a veterans organization dispute, or a dispute about the property of any non-religious group.

It is the judges of the Court of Appeals who entered the "forbidden thicket". They examined the governing documents and made an initial determination that the Serbian Orthodox Church is "hierarchial". Petitioners concede that it is in every religious and ecclesiastical way. However once past that obvious concession, the church structure is not hierarchial, not in the monolithic sense of Roman Catholicism. As was demonstrated by the documents admitted into evidence, the local congregation may by vote reject priests; the local congregation's own property is free of any superior right in the Diocese or in the Mother Church; it sends delegates to national assemblies and elects members to Diocesan boards which govern over the Diocesan property; and the Serbian Church is in many other ways one of mixed hierarchial and congregational polity.

As was demonstrated in the trial, the Diocese in the United States is the only Diocese in the Yugoslavian church structure which has its own written constitution. The American Diocese is the result not of missionary efforts and establishment by the Mother Church but is the natural result of early 20th century immigration of Serbians to

this country, their own joining together, and then their voluntary reuniting by written compact with the Patriarchate. For unknown reasons Belgrade insisted on dividing the only diocese in the non-Communist world and in 1963 attempted to do so. The question as to their right to do so has been in litigation ever since. In *Serbian Eastern Orthodox Diocese versus Ocokoljich,* 72 Illinois Appellate 2nd 444 (1966) it was decided in a case where all the contending bishops and all the contending dioceses were parties that Belgrade was bound by its own written instruments, and that it was without power to create three new dioceses out of the ashes of the Old. That determination was made again this spring in another chapter of the same case in an opinion and order not yet officially reported. (Appendix p. 45)

The Indiana Court of Appeals once having decided that the church had hierarchial aspects, avoided any other determination. In the fashion of Pontius Pilate they simply "washed their hands". The effect of this is, of course, to say that: "Whatever Belgrade wants, Belgrade gets," but more profoundly *it is very clearly the establishment of religion by a civil court* in the face of contradictory documents and in the midst of a dispute as to power sources.

The Court of Appeals has come to the aid of Belgrade—has ignored the by-laws of the South Bend Church—has ignored the constitution of the Illinois corporation—and has given its injunctive power to assist those South Bend Serbian churchgoers who want to go with Belgrade rather than stay with the Diocese. Obviously at the point the Court of Appeals did this, they made a determination about the "allocation of power within the church"; they made a determination as to "the identity of the governing body or bodies that exercise general authority within the church". This is exactly the sort of determination which

Mr. Justice Brennan (in the quotation which begins petitioners' argument) made it clear the Court should avoid.

An additional result of this opinion was to select one group of the disputants for preferred treatment. *Mary Blue Hull* and *Sharpsburg* are certainly the most compelling cases from Petitioner's stand-point, but this Court spoke to this narrower question long ago. In *United States v. Ballard* 322 U.S. 78 (1943) Mr. Justice Douglas, for the majority, stated: ". . . the Constitutional guarantee of religious freedom does not select any one group . . . for preferred treatment but puts them all in that position." Accordingly, under *Ballard,* the opinion appealed from is clearly not in accord with ruling precedents.

Certainly when the written compacts now found twice in the Illinois litigation to control the Bishops and the Diocese were ignored by Belgrade that amounted to an instance of a church ruling which was "arbitrary" in the extreme. Under *Gonzalez versus Roman Catholic Archbishop,* 208 U.S. 1, the Court should have examined Belgrade's acts prior to deciding to enforce them. The Illinois Court conducted such an examination and decided not to enforce those acts. The Indiana Court felt that it was barred from such an examination and subsequently decided to enforce those acts.

It never was this Court's intent that all disputes involving churches, their property, and their members were to be insulated from court intervention. This would result in anarchy. There must be a civilized way to resolve disagreements. The Court of Appeals of Indiana has grossly oversimplified the Court's ruling by taking the position that once they receive an inkling that the church in front of it has hierarchial aspects or that church-connected documents have ecclesiastical references contained in them, they must

thereafter simply enforce all orders of bodies claiming to be superior and may not examine the documents in front of them to see what secular force those documents have. In this instance the result of the Indiana opinion is to rip away Indiana property from its connection with an Illinois corporation in order to directly tie it in some metaphysical way with Belgrade.

To accomplish this the Court of Appeals made these startling pronouncements:

1. "Beliefs and practices in regard to the ownership of property are primarily religious and not secular." (Appendix p. 34); and,

2. ". . . the parts of the Constitution of the Mother Church and the United States and Canada Diocese relating to the ownership of property are clearly interspersed and interrelated with the other provisions relating to religious rites . . . these two constitutions are basically religious and not secular documents." (Appendix p. 34)

The argument is then made that, because property beliefs are religious, and because the property-governing documents are religious, the Court is not permitted to look at them.

Much attention is paid herein to the concurring opinion in *Sharpsburg,* but the *per curiam* opinion is, after all, the opinion of the Court. Note this quotation: ". . . the Maryland Court of Appeals *relied upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property.* (emphasis supplied) . . . Since the Maryland court involved no inquiry into religious doctrine . . . the appeal is dismissed." 396 U.S. 367 Supposedly controlled by *Sharpsburg,* the Indiana

court felt that it could not look at *pertinent provisions of the church constitutions.* It is difficult to conceive of a ruling more divergent from previous precedent.

There are other Serbian churches in Indiana faced with this opinon, an alarming precedent if allowed to stand. Is it the law that Belgrade has more power over its churches than Rome has over its churches? Is it the law that Belgrade has the power to control the use of Indiana property? If it is, it is the law only in Indiana.

In the other jurisdictions where litigation has ensued, the limited role of Belgrade in the secular affairs of church property in the United States of America has been recognized. If this is the law in Indiana then it is so because this Court allows the opinion here in question—an opinion not in accordance with governing Constitutional precedent—to stand.

CONCLUSION

For the foregoing reasons we submit the question presented by this petition as to the necessity of a civil court to fairly assist disputants in front of it rather than retreat by the simple act of labeling a dispute as "ecclesiastical" is substantial, and raises an issue under the First and Fourteenth Amendments of such weight as to merit the attention of this Court. We urge this Court to note probable jurisdiction and to grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

Judgment and Decree of the Circuit Court of Elkhart County, August 8, 1968

This cause having come on for trial upon the issue joined by the plaintiffs' complaint and the defendants' answer thereto and the court having heard the evidence and argument of counsel and having had this cause under advisement and being duly advised in the premises now finds for the plaintiffs and against the defendants, that the Serbian Eastern Orthodox Church and School Parish of St. Peter and St. Paul of South Bend, Indiana is a part of the Serbian Eastern Orthodox Diocese of the United States of America and Canada; the property, both real and personal, of said church and school parish is held in trust for the people of South Bend, Indiana and vicinity who are of the Serbian Orthodox faith and who are loyal to the Serbian Eastern Orthodox Diocese of the United States and Canada and has been consecrated to the use of the Serbian Orthodox Church and School Parish of St. Peter and St. Paul as a part of the Serbian Eastern Orthodox Diocese of the United States of America and Canada.

It is not the duty of this court to decide whether the diocesan bishop was justly or unjustly defrocked. This question is purely within the jurisdiction of the church government with headquarters at Belgrade and will not be disturbed by the courts.

There is no evidence that the defendants, nor those acting in concert with them, have been or are influenced or

in any way connected with the communist government of Yugoslavia or any other communist group.

The defendants and those acting in concert with them have dissolved their allegiance to the Serbian Eastern Orthodox Diocese of the United States and Canada and have transferred their allegiance and loyalty to a newly established Middle Western American Diocese of the Serbian Orthodox Church and have appropriated and continue to occupy, use, manage, control and devote the property of said church and school parish to the use and benefit of those bearing allegiance to said newly established diocese and/or to the use and benefit of said newly established Middle Western American Diocese of the Serbian Orthodox Church in violation of the trust imposed upon said property.

All actions of the officers and of the governing bodies of said church and school parish and the implementation of all decisions by any and all of them and of the defendants and those acting in concert with them incident to, designed or intended to dissolve allegiance of the church and school parish to the Serbian Eastern Orthodox Diocese of the United States and Canada with its See at Libertyville, Illinois, governed by the corporation of that name organized under the laws of the State of Illinois are null and void.

The plaintiffs herein and all others similarly situated who are united in interest have maintained allegiance and loyalty to the Serbian Eastern Orthodox Diocese of the United States and Canada and as members of said church and school parish have resisted and objected to the use of said church and school parish property for the use and benefit of those bearing allegiance to said newly established diocese and/or to the use and benefit of said newly

established Middle Western American Diocese of the Serbian Orthodox Church and are entitled to have said church property devoted to the exclusive use and benefit of those maintaining allegiance and loyalty to the Serbian Eastern Orthodox Diocese of the United States and Canada in compliance with the trust imposed upon said property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court:

1. All actions of the officers and of the governing bodies of the Seriban Eastern Orthodox Church and School Parish of St. Peter and St. Paul of South Bend, Indiana, and the implementation of all decisions by any and all of them and of the defendants and those acting in concert with them incident to, designed or intended to dissolve allegiance of the said church and school parish to the Serbian Eastern Orthodox Diocese of the United States and Canada with its See at Libertyville, Illinois, governed by the corporation of that name organized under the laws of the State of Illinois are null and void.

2. The property, both real and personal, owned by the Serbian Eastern Orthodox Church and School Parish of St. Peter and St. Paul of South Bend, Indiana, shall be occupied, used and devoted to the exclusive use and benefit of those who do now maintain or who may hereafter establish or reestablish and maintain allegiance and loyalty to the Serbian Eastern Orthodox Diocese of the United States and Canada.

3. The defendants and all those acting in concert with them who refuse to establish or reestablish allegiance and loyalty to said Serbian Eastern Orthodox Diocese of the United States and Canada be and they hereby are

permanently enjoined from asserting or exercising any claim or right to the occupancy, possession of, or use of the property, real or personal, belonging to the Serbian Eastern Orthodox Church and School Parish of St. Peter and St. Paul of South Bend, Indiana.

4. The defendants and all those acting in concert with them as aforesaid be and they hereby are permanently enjoined from doing any act or continuing any act or action which interferes with or is calculated or intended to interfere with the free and exclusive occupancy, possession, and use of the property, both real and personal, of said church and school parish by those who now maintain or who may hereafter establish or reestablish and maintain allegiance and loyalty to the Serbian Eastern Orthodox Diocese of the United States and Canada.

5. That the plaintiffs recover of defendants the costs of this action in the sum of $—.

All of which is finally ordered, adjudged, and decreed by the court this 15th day of August, 1968.

/s/ Aldo J. Simpson

ALDO J. SIMPSON, Judge
Elkhart Circuit Court

OPINION OF THE COURT OF APPEALS OF INDIANA

(Decided March 20, 1972)

This case involves a dispute between two contesting groups in the Serbian Eastern Orthodox Church and School Parish of St. Peter and St. Paul in South Bend, Indiana, hereinafter called local church, for the use and control of the church property.

To understand the contentions of the parties it is necessary to outline certain developments within the Serbian Eastern Orthodox Church whose See is in Belgrade, Yugoslavia, hereinafter called Mother Church, particularly certain events in the year 1963 and since.

Generally the Mother Church is a part of the Eastern Orthodox branch of the Christian religious community which traces its practices through the division with the Roman Catholic Church in the 11th Century to the Council of Nicea in the year 325 A.D. There have been literally libraries written describing these historical events. One of the most succinct statements in this regard is set forth by the Supreme Court of Michigan in *Hanna v. Malick*, 223 Mich. 100, 193 N.W. 798 (1923).

The rites, doctrines, polity and practices of the Serbian Eastern Orthodox Churches are closely related to those of the Eastern Orthodox Churches which developed in other eastern European and near eastern areas such as the Russian, Greek, Bulgarian and Romanian Eastern Orthodox Churches, and were the result of several centuries of development. Thus, the rites, doctrines, polity and practices are often complex and difficult for the un-

initiated to understand. This fact is well born out in this case where we have a trial that lasted eight weeks producing a transcript of 4229 pages in nine separate volumes. A substantial portion of the trial of this case was an in-depth consideration of the rites, doctrines, polity and practices of the Mother Church and the Serbian Eastern Orthodox Diocese of the United States of America and Canada, hereinafter called United States and Canada Diocese, as well as the local church.

Prior to May 10, 1963, the local church was a constituent part of the United States and Canada Diocese of the Mother Church. This diocese as then constituted comprised the entire territory of the United States and Canada and was one of the dioceses of the Mother Church. The spiritual head of the Mother Church was the Serbian Patriarch and the power of appointment was vested in the Holy Assembly of Bishops, also known as the Holy Episcopal Council. Before May 10, 1963, Bishop Dionisije was designated as Bishop of the United States and Canada Diocese by the Holy Assembly of Bishops. On that date the Holy Assembly with the approval of the Patriarch divided the United States and Canada Diocese into three new dioceses and added some new territory from Africa and South America. New Bishops were appointed in each of the three new dioceses. Bishop Dionisije opposed this division and sought the support of others. Dionisije was later defrocked on March 15, 1964. In general, the Plaintiffs-Appellees are supporters of Dionisije in the local church and the Defendants-Appellants are loyal to the Mother Church and desire to retain the hierarchical connection with the Mother Church.

In 1966, the Appellees brought an action for injunction to prohibit the Appellants from exercising control and

ownership of the property in South Bend, Indiana. The prayer for relief in the Appellees' Petition for Injunction is revealing of the subject matter of the action. It states:

> "WHEREFORE, plaintiffs pray that the defendants comprising the Board of Trustees of the church and the defendant Walter Milovich and each and every person acting in consort with them be restrained and enjoined from convening, conducting or holding any meeting of the membership of the church on March 22, 1964, and from submitting thereto any proposal to determine, by majority vote or otherwise, whether the membership of the church recognizes church affiliation with the mother church, the Serbian Orthodox Holy Synod, the Serbian Orthodox Holy Council of Bishops, and the Serbian Orthodox Bishop Firmillion Ocakoljich, or from doing any other act or causing any other member or group of members of the church to do any act calculated or intended to or which might separate or tend to separate the church from the Serbian Eastern Orthodox Diocese of the United States of America and Canada in defiance of the ecclesiastical laws, usages, customs and principles which are accepted by all members of the church prior to the pretended dissolution of the Serbian Eastern Orthodox Diocese of the United States of America and Canada in 1963 pending the giving of notice to the defendants of the hearing and the hearing on plaintiffs' application for temporary injunction, and that after due notice and hearing the defendants and all others acting in consort with them be temporarily and permanently enjoined as prayed for herein and plaintiffs be granted all other and proper relief."

The trial court entered special findings and conclusions and granted a permanent injunction for the Appellees on August 15, 1968. The essential finding and conclusion which is in dispute is the determination that the

Mother Church was without legal authority to divide the United States and Canada Diocese and therefore such action was null and void. Such decision necessarily removes the control and use of the property where the local church is located from the group which has remained faithful to the Mother Church.

The period between August 15, 1968, when the trial court entered judgment and late 1971 was taken up in the lengthy process of perfecting this appeal. This appeal was originally filed in the Supreme Court of Indiana which transferred it to this court for consideration on the merits by order on January 10, 1972. The Appellants have also filed a Brief in four volumes consisting of 1020 pages for our consideration. We realize that in cases such as this emotions run high. Counsel for all parties and the trial judge have handled this difficult case in a highly professional manner and are to be commended.

There are two questions which we must consider:

1. The nature of the church organization involved in this dispute.

2. Whether the decision of the trial court transgressed the boundaries of the First Amendment to the Constitution of the United States.

Notwithstanding the limitations imposed on the civil courts, which we will detail later, the civil courts can (and indeed must in some cases) look at ecclesiastical documents and related evidence concerning religious rites, doctrines, polity and practices for the limited purpose of determining the nature of the church organization.

The landmark and oft cited case, *Watson v. Jones,* 13 Wall 679, 80 U.S. 679 (1872), sets forth and defines the

three general categories of such organizations, the same being congregational, connectional and hierarchical. While the facts often do not fit neatly into these molds, and some church organizations represent a blend of more than one kind, the definitions are sufficient for us here.

We are here asked to review a massive volume of documentary evidence related to this and other issues. It is still the law of Indiana that upon appellate review the appellate tribunal is in as good a position as the trial court to interpret documentary evidence. Both parties have urged this rule on this court for a proper determination and have relied on Wiltrout, Indiana Practice, Vol. 3, §2786.

In *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 73 S. Ct. 143, 97 L. Ed. 120 (1952), the Supreme Court of the United States said: "hierarchical churches may be defined as (1) those organized as a body with other churches (2) have a similar faith and doctrine (3) with a common ruling convocation or ecclesiastical head . . ." 344 U.S. 110.

Some of the relevant articles are set forth and discussed below. The constitution of the United States and Canada Diocese contains 163 articles covering 33 pages in the transcript and the constitution of the Mother Church contains 269 articles which is published in a booklet of 82 pages. In addition there are the by-laws of the local congregation for the year 1916 which consists of 31 articles and the 1953 by-laws of the local congregation consisting of 86 articles for the church in addition to 32 articles for the local church club. There is also the articles of incorporation of the Serbian Society of St. Peter and St. Paul's Church of South Bend, Indiana, in 1928 consisting of four articles.

Article 1 of the Diocesan Constitution provides:

"The Serbian Orthodox Diocese in the Northern States of American and Canada is ecclesiastically-judicially as an organic part of the Serbian Patriarchate in the Kingdom of Yugoslavia and enjoys all the benefits which orginate therefrom."

Article 2 of the Diocesan Constitution provides:

"All statutes and rules which regulate the ecclesiastical-canonical authority and position of the Serbian Orthodox Church in the Kingdom of Yugoslavia are also compulsory for the Serbian Orthodox Diocese in the United States of North America and Canada, with the exception of specific cases which must be formulated with regard to local circumstances in accordance with ecclesiastical and judicial principles."

Article 3 of the Diocesan Constitution provides:

"The jurisdiction of the Serbian Orthodox Diocese in the United States of America and Canada with its Diocesan See in Chicago, includes the entire political territory of the United States of America and Canada, which as such by its geographical location enjoys full administrative freedom and accordingly, it can independently regulate and rule the activities of its church, school and other diocesan institutions and all funds and beneficiaries, through its organs, but in accordance with the laws of this constitution and in agreement with the laws of the United States of America and Canada.

Article 4 of the Diocesan Constitution provides:

"The Serbian Orthodox Diocese in the United States of America and Canada is comprised of Serbian Orthodox Church-school Congregations — Parishes, churches, monasteries, archpresbyterates, established within the territory of the above mentioned states

and which fall under the spiritual, executive, ecclesiastical—judicial and controlling authority of the diocesan organs (Bishop and Diocesan Council). Therefore, every Serbian Orthodox Church—school Congregation, church monastery, and archpresbyterate already existing or which shall be established in the above mentioned territories must be in ecclesiastical—canonical bond with this Diocese and recognize its authority and power."

Article 9 of the Diocesan Constitution provides:

"The Bishop of the Serbian Orthodox Diocese in the United States of America and Canada is appointed by the Holy Assembly of Bishops of the Serbian Patriarchate."

Article 10 of the Diocesan Constitution provides:

• • •

"The following comes within the jurisdiction of activity of the diocesan bishop:

(a) to preserve, defend and sustain among the people, One, Holy, Ecumenical and Apostolic church and repeal all activities contrary to Orthodoxy;

• • •

(h) to execute all canonical orders of the Holy Assembly of Bishops;

• • •

(o) To inform the clergy and laity of various canonical directives from the Holy Pontifical Synod;

(p) To submit to the Holy Bishop's Assembly of the Serbian Patriarchate an annual report of his archipastroal activities; and . . .".

Article 12 of the Diocesan Constitution provides:

"The Diocesan Bishop in the United States of America and Canada is obliged to recognize as the head of the Serbian Patriarchate, the Archbishop of Ipek, Metropolitan of Belgrade-Karlovac and Serbian Patriarch, whom he mentions in all services. He shall not make any changes or innovations in the established order and work of the church without prior agreement with him.

"Accordingly, the Diocesan Bishop shall submit to the Serbian Patriarch for review, all regulations which may be issued by any diocesan authority, which shall if they touch upon the sphere of internal church administrations, be subject to, the approval of the Holy Pontifical Synod, as the highest executive church authority.

"Should the Diocesan Bishop find by his own assurance, that the decisions rendered by any church authority or organ are contrary to the teachings of the Holy Church, her regulations and canons, or to the vital interest of the church, he shall halt the execution of such decision and submit the matter for rediscussion and redecision. If he again is not in accord with redecision as reconsidered, he shall submit the case for final decision to a higher authority and if necessary, to the Holy Pontifical Synod."

Article 13 of the Diocesan Constitution provides:

"In the event of illness or absence, the Diocesan Bishop assigns his own substitute and designates his authority. When the seat of the Diocese Bishop is vacated, the administration of the widowed diocese is upheld in all her spiritual and administrative matters by the Ecclesiastical Court and the Diocesan Council until the appointment of an administrator, which appointment is made by the Serbian Patriarch with the Holy Pontifical Synod."

Article 14 of the Diocesan Constitution provides:

• • •

"The Diocesan Bishop is at the same time the supreme head of the St. Sava Monastery in Libertyville. He appoints the abbot of same and conducts the canonical supervision and the higher executive authority over the monastery.

Article 53 of the Diocesan Constitution provides in part:

"Decisions made by the Diocesan Bishop alone or together with the Diocesan Ecclesiastical Court, have the validity and power of decrees of Ecclesiastical Courts in the first instance. The highest and final instance in the Holy Bishop's Synod."

Article 56 of the Diocesan Constitution provides:

"Court procedures and order of business of the Ecclesiastical Court will be prepared by the Ecclesiastical Court itself with the approval of the Holy Bishop's Assembly of the Serbian Church.

"If the Bishop should disagree with the decision of the Diocesan Ecclesiastical Court, as well as with the decision of some Diocesan committee or Diocesan Council, the matter in question will be sent to the Holy Bishop's Synod of the Serbian Church for final Decision."

Article 156 of the Diocesan Constitution provides:

"All real estate and personal property of the St. Sava Monastery in Libertyville as well as the other Serbian Monasteries should they be organized, is supervised by the monastery's administration under the direct control of the Diocesan Bishop.

The fundamental set of rules governing the Mother Church are set forth in Article 7 of its own Constitution.

The Constitution of the Mother Church so establishes the subordinate relation to the Diocese in the United States.

Article 1 of the Mother Church Constitution provides:

"The Serbian Orthodox Church is one, undivided, and autocephalous. The Church confesses publicly its religious teachings, performs publicly its religious services, and governs and regulates independently all its religious affairs. * * *"

Article 2 of the Mother Church Constitution provides:

"The Serbian Orthodox Church has a rank of a Patriarchate."

* * *

Article 5 of the Mother Church Constitution provides:

"The legal persons in the Serbian Orthodox Church are these: Patriarchate, dioceses, church congregations, monasteries, foundations, independent institutions or such funds designated for places of worship.

"These legal persons may, in accordance with legal regulations, acquire and hold either personal or real properties, and have all the rights and obligations in that capacity."

* * *

Article 8 of the Mother Church Constitution provides:

"Organization of the Serbian Orthodox Church is church-hierarchical and church-administrative.

"All the church spiritual, disciplinary and legal authority, in accordance with the canons and rules of the Serbian Orthodox Church, belongs exclusively to the hierarchy. This authority is exercised through its hierarchical representatives and organs.

* * *

Article 10 of the Mother Church Constitution provides:

> "In the Serbian Orthodox Church there are church hierarchical and administrative authorities bodies and organs:
>
> 1. Patriarch, Holy Bishops Council and Holy Synod, High Ecclesiastical Court, Patriarchal Council and Patriarchal Board;
>
> 2. Diocesan Bishop, diosecan ecclesiastical court, diocesan council and diocesan executive board;
>
> 3. Bishop's vicar;
>
> 4. Parish priest;
>
> 5. Church congregational council and church congregational executive board;
>
> 6. Abbot and monastery brotherhood."

Article 12 of the Constitution of the Mother Church provides:

> "The Servian Orthodox Church is episcopal. Its main administrative division is composed of dioceses, both in regard to Church hierarchical and church administrative aspects."

Article 13 of the Mother Church Constitution provides:

> "At the head of the Serbian Orthodox Church is the Serbian Patriarch, as its chief ruler. . . .
>
> "At the head of each diocese there is a diocesan bishop as its direct rules. [sic] He is, according to the church canonical regulations, chief representative and guiding leader of all church spiritual life and church order in the diocese and he rules the diocese assisted by his clergy and laymen."

Article 14 of the Mother Church's Constitution enumerates the dioceses located within the territory of

Yugoslavia while Article 15 enumerates the dioceses located outside the geographical confines of Yugoslavia. Among the dioceses outside Yugoslavia is included the religious body in this country. The only distinction between dioceses within and without Yugoslavia is in administration. The dioceses located outside Yugoslavia have internal administrative autonomy; however, they are hierarchically and sacramentally (canonically) an integral part of the Mother Church. Article 16 of the constitution of the Mother Church authorizes the Holy Assembly to establish, liquidate, or reorganize dioceses.

Article 30 of the Mother Church Constitution provides:

> "The founding of new monasteries, as well as the merging of existing ones, is performed by the Diocesan Bishop, and he informs the Holy Synod of Bishops which grants the final approval."

• • •

Article 64 of the Mother Church Constitution provides:

> "All the decisions of the Holy Assembly of Bishops and of the Holy Synod of Bishops of canonical and church nature, in regard to faith, officiation, church order and internal organization of the church are valid and final."

Article 2 of the Bylaws of the local congregation states:

> "The Serbian Orthodox Church and School Parish of St. Peter and St. Paul, as [sic] a part of the Serbian Eastern Orthodox Diocese of the United States of America and Canada and as such upholds all of the church canon laws and other laws of the church, according to the head of the diocese, who is the Bishop, or his assistants."

We conclude that the relationship between the local church, United States and Canada Diocese and the Mother

Church was based on a hierarchical structure within the meaning of *Watson v. Jones* and *Kedroff*, supra. Our decision that we are here dealing with a hierarchical church is bolstered by the decisions of courts in other jurisdictions dealing with the same question. See Serbian Orthodox Diocese v. Ockoljich, 711 Ill. 244, 219 N.E. 2d 343 (1966); *Serbian Eastern Orthodox Congregation of "St. George" v. Serbian Eastern Orthodox Diocese for Eastern States of America and Canada*, 106 N.J. Super. 22,254 A.2d 119 (1969), cert. den. 397 U.S. 961, rehearing den. 397 U.S. 1058 (1970); and *Serbian Orthodox Church Congregation of St. Demetrius v. Kelemen*, 21 Ohio St. 2d 154, 256 N.E. 2d 212 (1970). For this same interpretation in a similar religious organization, see *St. Michael & Archangel Russian Orthodox Greek Catholic Church v. Uhniat*, 436 Pa. 222, 259 A. 2d 862 (1969), cert den. 400 U.S. 823, reh. den. 400 U.S. 930 (1971); *Macedono-Bulgarian Orthodox Church v. Macedonian Patriotic Organization*, 27 Mich. App. 713, 184 N.W. 2d 233 (1970). In *Dragelevich v. Rajsich*, 24 Ohio App. 2d 59, 263 N.E. 2d 778 (1970), which wasn't cited by either party here, the court stated: "Our conclusion is that the creation or alteration of the diocese having supervision over this parish church and the appointment or removal of either the bishop presiding over the appropriate diocese or parish priest assigned to this church are matters of church government and constitutionally protected from state interference in the absence of any proof that the exercise of such powers was either fraudulent, collusive or arbitrary."

We must next turn our attention to the central issue in this case: Whether the trial court transgressed the First Amendment in deciding that the Mother Church's act in dividing the United States and Canada dioceses was null and void.

All concede that any remedy for the defrocking of Dionisije is not to be found in the civil courts and the trial court explicitly excluded any consideration of this issue.

The proper First Amendment touchstones have been set forth by the Supreme Court of the United States in a line of cases commencing with *Watson v. Jones* decided a century ago. The principles and limitations for review of church property disputes found in *Watson v. Jones* were elevated to constitutional status in *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 83 S. Ct. 143, 97 L. Ed. 120 (1957) and *Kreshik v. St. Nicholas Cathedral,* 363 U.S. 190 (1960). These were more broadly stated in *Presbyterian Church of the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969). The last word from the Supreme Court of the United States and perhaps the best synthesis of these principles is found in *Maryland and Virginia Elder of Churches of God v. Church of God at Sharpsburg, Inc.,* 396 U.S. 367 (1970), in which Mr. Justice Brennan, the author of the court's opinion in the *Hull Memorial* case, stated in concurring opinion:

> "We held in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 449, 89 S. Ct. 601, 606, 21 L. Ed. 2d 658 (1969), that 'First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely eccelesiastical concern. * * * [T]he [First] Amendment therefore commands civil courts to decide church property

disputes without resolving underlying controversies over religious doctrine.' It follows that a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenents of faith.

Thus the States may adopt the approach of *Watson v. Jones,* 13 Wall. 679, 20 L. Ed. 666 (1872), and enforce the property decisions made within a church of congregational polity 'by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government,' id., at 724 and within a church of hierarchical polity by the highest authority that has ruled on the dispute at issue, unless 'express terms' in the 'instrument by which the property is held' condition the property's use or control in a specified manner. Under Watson civil courts do not inquire whether the relevant church governing body has power under religious law to control the property in question. Such a determination, unlike the identification of the governing body, frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine. Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy. In other words, the use of the Watson approach is consonant with the prohibitions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity.

> '[N]eutral principles of law, developed for use in all property disputes,' *Presbyterian Church supra,* 393 U.S. 440 at 449, 89 S. Ct. at 606, provide another means for resolving litigation over religious property. Under the 'formal title' doctrine, civil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws. Again, however, general principles of property law may not be relied upon if their application requires civil courts to resolve doctrinal issues. For example, provisions in deeds or in denomination's constitution for the reversion of local church property to the general church, if conditioned upon a finding of departure from doctrine, could not be civilly enforced." (footnotes omitted)

One additional decision must be mentioned. In *Gonzalez v. Archbishop of the Philippines,* 280 U.S. 1 (1929), Mr. Justice Brandeis stated: "In the absence of fraud, collusion, or arbitrariness, the decision of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before secular courts as conclusive. . . ." This area of determination was expressly retained in *Hull Memorial* case. However, in this case there was no contention in the trial court by any of the parties relating to fraud, collusion or arbitrariness.

Our Indiana Supreme Court has had the occasion to apply the *Hull Memorial* case in *Smart v. Indiana Yearly Conference of Wesleyan Methodist Church,* —— Ind. ——, 271 N.E. 2d 713, 715 (1971), in which Judge Givan, speaking for the court, stated:

> "It is appellants' position that the appellee conference paid nothing whatever for the real estate in question and that the appellee therefore relies solely on the discipline of the church to sustain its ownership of the land. Appellants thus reason that the judgment in favor of the appellee by the trial court was in viola-

tion of the principle of law laid down in *Presbyterian Church of the United States v. Mary Elizabeth Blue Hull Memorial Presbyterial Church* (1969), 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 and *Merryman v. Price* (1970), Ind., 259 N.E. 2d 883, 22 Ind. Dec. 62. [cert. den. 92 S. Ct. 890 (1971)]

In reality it is the appellants who are relying on the discipline of the church in their attempt to establish an equitable ownership of the real estate in question. The appellee has demonstrated its ownership of the property, subject only to the possibility of an equitable trust established for the benefit of another. The appellants attempt to make their case of an equitable trust by turning to the discipline of the church. As pointed out in the *Presbyterian Church* case, supra, and the *Merryman* case, supra, the civil courts will not pass upon matters of ecclesiastical discipline.

We would observe that Justice Harlan in his concurring opinion in the Presbyterian Church case correctly observes that civil courts can enforce conditional trusts if the fulfillment of the condition can be immediately ascertained without determining ecclesiastical questions."

A key sentence in the *Hull Memorial* case is "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." 89 S. Ct. at page 606.

This causes us to consider what is religious doctrine and practice. From the facts in the *Hull Memorial* case we can find a strong limitation on the civil courts in determining questions of departure from doctrine as it relates to implied trusts. Just exactly what other basis is available to a civil court from which it might find an implied trust to exist in a church property dispute is left open. In *Sharpsburg* there is a strong suggestion that such

an implied turst may not be found to exist if the resolution of the question requires consideration of doctrinal questions and an extensive inquiry into religious polity. We are not here required to decide whether the implied trust theory can be used since we reach our decision without regard to it.

The religious rites, doctrines, polity and practices of a church certainly contain as an essential part beliefs and practices in regard to the ownership of property. These beliefs are primarily religious and not secular. Frequently these beliefs are as strongly held *as religious beliefs* in regard to baptism or the sacraments. In other words, *beliefs* as to the proper method for a church to own property are frequently bound up with and intermingled in the religious rites, doctrines, polity and practices of the church.

In this case the parts of the constitution of the Mother Church and the United States and Canada Diocese relating to the ownership of property are clearly interspersed and interrelated with the other provisions relating to religious rites, doctrines, polity and practices. A cursory examination of these two constitutions clearly demonstrate that they are basically religious and not secular documents. The civil courts have been admonished to exercise great self-restraint in attempting to interpret disputes arising under such religious documents. The *Hull Memorial* and *Sharpsburg* cases frame this self-restraint in terms of First Amendment values. The civil courts may make a limited examination of religious instruments to determine the nature of the particular church organization within the meaning of *Watson v. Jones* and *Kedroff*. The civil courts tread on constitutionally impermissible grounds when they attempt to interpret the rights of parties under

such religious documents. To paraphrase Mr. Justice Frankfurter in another contest, the civil courts should and must restrain themselves from involvement in an ecclesiastical thicket. The difficulties and dangers inherent in a civil court attempting to sort out what part of a church's rights, doctrines, polity and practices represent religious doctrine and what do not are well outlined in 75 Harvard L. Rev. 1142-1186 (1962).

In this case the trial court clearly went beyond the limits of the First Amendment in deciding that the Mother Church was without authority to divide the United States and Canada Diocese and create the three new dioceses. In reaching its decision the trial court had to probe deeply into the allocations of power within the church so as to decide where the religious law places control over the use of church property.

It is helpful to consider how the courts in other jurisdictions have considered this same question. In *Serbian Eastern Orthodox Church Congregation v. Serbian Eastern Orthodox Congregation*, 254 A. 2d 122, a case involving the same dispute as here, the court states:

> "... under the *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* we may not on this appeal review the validity of the action of the Holy Assembly of Bishops, acting under the authority of article 16 of the constitution of the mother church, in subdividing the old diocese, and appellants make it clear in their reply brief that they are not seeking such review. Further, assuming, as the court there pointed out, that a narrow review of a specific ecclesiastical decision would be permissible under *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 50 S. Ct. 5, 74 L. Ed. 131 (1929), to determine whether fraud, collusion or arbitrariness appeared, the proofs here are entirely deficient in that respect."

The factual and procedural development of the decision of the Ohio Supreme Court in the *Kelemen* case, supra, is also pertinent. That case involved the congregation at Akron, Ohio, which was involved in a dispute similar to the one here. The Ohio Appellate Court found that the Mother Church did not have the right, without the consent of the diocese, to reorganize or change the territory of the diocese. The Supreme Court of Ohio affirmed and a petition for a writ of certiorari was filed in the Supreme Court of the United States. On February 24, 1969, the Supreme Court of the United States granted a writ of certiorari, vacated the judgment and remanded the case to the Supreme Court for further consideration in light of the *Hull Memorial* case. See 89 S. Ct. 849 (1969). On remand, the Supreme Court of Ohio, 256 N.E. 2d at page 216, stated:

> "Briefly stated, our inquiry is: Did the Court of Appeals base its judgment, awarding possession and control of the property involved, upon consideration of whether the parties had adhered to or departed from church tenets and doctrine, or did it base its judgment upon principles of neutral law?
>
> The answer lies in the appraisal of the findings of that court. The Court of Appeals' factual findings regarding the name, incorporation, the hierarchical form of organization, and plaintiff's claim of autonomy from the Mother Church did not require a decision involving church doctrine or tenets.
>
> That court arrived at legal conclusions relative to the organizational relationship, powers and duties of the Mother Church concerning the appointment of a bishop for the Diocese of the United States and Canada, and the Mother Church's attempt to eliminate the diocese. While we recognize that these matters of internal church organization are chronic sources of disagreement for the parties and are frequently

mentioned in the pleadings, briefs and arguments, the findings of the Court of Appeals are unnecessary and immaterial to a neutral law inquiry utilizing principles of law developed for use in all property disputes. Further, the *Hull Memorial* case offers the strong suggestion that civil courts cannot constitutionally determine matters of church government. In that case, the court's opinion cites with approval *Kedroff v. St. Nicholas Cathedral of Russian Orthodox, Church in North America,* 344 U.S. 94, at page 116, 73 S. Ct. 143, at pages 154-155, 97 L. Ed. 120, • • •

In addition, the Court of Appeals found that the members of plaintiff association have performed schismatic acts amounting to a withdrawal from the general church. The essence of this finding must lie in a judicial determination that plaintiff has acted contra to the doctrine and tenets of the church. In order to make such a finding the Court of Appeals had to examine plaintiff's activity as well as church doctrine and tents. The *Hull Memorial* case, supra, held that a jury could not make such examination, and the viability of the principle of the *Hull Memorial* case commands the same judicial abstinence in the instance case.

• • •

In the case at bar, we are not confronted with the problem of whether we can constitutionally order the enforcement of a determination made by an ecclesiastical tribunal. Other than the order creating the three new dioceses, the record fails to indicate an ecclesiastical tribunal's determination concerning the power of the Mother Church to eliminate the American-Canadian Diocese. The record does not illustrate the plaintiff has been ecclesiastically adjudicated to be outside the church doctrine because of the commission of certain acts. Additionally, the determination of the status of Bishop Dionisije, who was ecclesiastically adjudged defrocked, is frequently mentioned but remains unnecessary to our inquiry.

> Any question concerning court enforcibility of such a church determination is not before us.
>
> All the agonies of a church controversy are discernible from a review of this case, but we are convinced by the rule of the *Hull Memorial* case that the civil court's role as a tribunal to bring order to church controveries is narrowly limited."

Thereafter, the Supreme Court of the United States denied certiorari, 400 U.S. 827 (1970).

It is unfortunate that the trial court did not have the *Hull Memorial, Sharpsburg, Kelemen, Serbian Eastern Orthodox Congregational* (N.J.), *Smart* and *Merryman v. Price* cases before it when it entered its findings and judgment in 1968.

The Appellees rely strongly on the *Serbian Orthodox Diocese v. Ocokoljich,* supra, which was decided before the *Hull Memorial* opinion in 1969 and *Sharpsburg* opinion in 1970. In *Ocokoljich* there was a basic finding that the Mother Church involved was hierarchical. With this we agree. Beyond this the Appellate Court of Illinois became involved in a civil determination of the allocation of power within the church. In doing so they went beyond the outer limits prescribed in *Hull Memorial* and *Sharpsburg.*

The documentary evidence in this case discloses that the local church in South Bend was organized as a church within the hierarchy of the Mother Church and therefore those who remain loyal to the Mother Church are entitled to control and use of the property in question.

We do not deem it necessary to do so, but the same result could be reached, which we reach here, under the so-called formal title approach mentioned in the *Sharpsburg, Kelemen, Merryman v. Price,* and *Dragelevich* cases. In this case neither the trial court nor this court are asked or

required to determine the title to real estate. An injunction was sought to determine the right to control and use the property in question. The injunction was granted on a constitutionally impermissible basis and therefore cannot stand. This controversy has been thoroughly aired and we can see no basis for permitting a new trial in this case.

Therefore, this case is reversed and remanded with instruction to set aside and dissolve the injunction heretofore entered and to enter judgment for the Appellants denying relief on the Appellees' complaint for injunction.

Reversed and remanded.

Hoffman, C. J. and Staton, J. concur.

DENIAL OF PETITION FOR REHEARING
(August 11, 1972)

You are hereby notified that the Court of Appeals has on this day Denied Appellee's petition for rehearing. Allen Sharp, Acting Chief Justice. Chief Justice Hoffman dissents with Opinion.

ON PETITION FOR REHEARING

HOFFMAN, CHIEF JUDGE.

I would grant appellees' petition for rehearing filed herein.

Although I agree with the result reached in the opinion previously handed down (*Draskovich v. Pasalich* (1972), 280 N.E. 2d 69), I am not in full accord with the reasoning therein.

After further research and a study of the briefs, the case of *Serbian Orth. Ch. Cong. of St. Demetrius v. Kelemen* (1970), 21 Ohio St. 2d 154, 256 N.E. 2d 212, should be used as a guide in reaching a proper result wherein the court stated:

> "The control of the name and property, of the Serbian Orthodox Church Congregation of St. Demetrius of Akron, Ohio, must be determined only by reference to the provisions of the Code of Regulations and By-Laws of the corporation not for profit, the corporate laws of this state, and any other secular instruments not requiring the resolution of religious tenets or doctrine."

Following that guide the church properties in the case at bar should be subject to the control of the voting members of the church and the majority decision of such members should have the control and use of the church properties.

Ruling of the Supreme Court on Petition to Transfer.

IN THE

SUPREME COURT OF INDIANA

(On Petition to Transfer From The Court of Appeals of Indiana)

Nick Draskovich, Et Al.,	)	
	)	Court of Appeals
vs.	)	No. 172 A 13
	)	Appeal From The
Novak Pasalich, Et Al.,	)	Elkhart Circuit Court
	)	

Plaintiff—Appellees Petition to transfer is hereby DENIED this 7th day of May, 1973.

N. F. Arterburn
Chief Justice

Hunter, J. dissents

IN THE CIRCUIT COURT OF
LAKE COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

The Serbian Eastern Orthodox Diocese For the United States of America and Canada, a religious body, et al., *Plaintiffs,*		FILED APR 30 73
vs.		No. 63-1644 Consolidated
Dionisije Milivojevich, et al., *Defendants.*	No. 63-2312	

FINAL DECREE

This consolidated cause having come on to be heard for the entry of a Final Decree the Court having filed its Memorandum Decision on December 28, 1972, and having heard the statements of counsel for the parties made in open court and being otherwise fully advised in the premises, finds and concludes as follows:

1. The plaintiffs are the Serbian Eastern Orthodox Diocese for the United States of America and Canada a religious body duly organized and existing since 1921; Bishop Firmilian Ocokoljich, a Serbian cleric (hereinafter referred to as "Bishop Firmilian"); Bishop Sava Vukovich, a Serbian cleric; Bishop Gregory Udicki, a Serbian cleric; and certain representative individuals, both laymen

(Emil Droback, Sam Milanovich and Donald Kral) and Clerics (Very Reverend Dusan Popovich, Very Reverend Dusan Klipa and Very Reverend Vladimir Mrvichin), who sue on their own behalf and on behalf of those persons, lay and clerical, who recognize and adhere to ecclesiastical and hierarchical allegiance to the Serbian Orthodox Church whose Patriarchal See is located in Belgrade, Yugoslavia, which church is one of fourteen recognized orthodox ecclesiastical and hierarchical churches in the world and is hereinafter referred to as the "Serbian Church."

2. The defendants are Dionisije Milivojevich (hereinafter referred to as "Dionisije"), a former Bishop of the Serbian Church, a former diocesan bishop and officer and agent of the Serbian Eastern Orthodox Diocese for the United States of America and Canada; the Serbian Eastern Orthodox Diocese of the United States of America and Canada, an Illinois religious corporation organized and existing since 1935 under the Illinois Religious Corporations Act (hereinafter referred to as the "Illinois religious corporation"); and, the Serbian Orthodox Monastery of St. Sava, an Illinois not-for-profit corporation organized and existing since 1945 under the Illinois Not-for-Profit Corporations Act (hereinafter referred to as the "Illinois not-for-profit corporation").

3. The Serbian Church is an ancient, world-wide, hierarchically organized church. Under the Serbian Church's hierarchical organization, the geographical territories throughout the world over which it assumes ecclesiastical authority and administration are designated, fixed and determined by the Church's Holy Assembly of Bishops and thereafter designated and set forth in its Constitution and each is designated a diocese of the Serbian Church; subject, however, to the provisions in the Constitution of

the Serbian Church and the provisions in the Constitution of the Serbian Eastern Orthodox Diocese for the United States of America and Canada, reserving to the latter said Diocese full administrative freedom in all administrative aspects.

4. The sole power and authority to elect, ordain and assign a Diocesan Bishop rests in the Serbian Church's Holy Assembly of Bishops. Each Diocesan Bishop is, by virtue of his office as Diocesan Bishop, a member of the Holy Assembly of Bishops (hereinafter referred to as the "Holy Assembly"), the Serbian Church's highest hierarchical judicatory. At the head of the Holy Assembly is one of its number who is designated as Patriarch (the first among equals), who is elected to his office as Patriarch by the Holy Assembly and serves as its President. The executive branch of the Holy Assembly is the Holy Synod. It consists of the Patriarch and four other Diocesan Bishops selected by the Holy Assembly.

5. Neither the Illinois religious corporation nor its members have, nor have they or any of them ever had, the authority to elect, ordain, assign, reject or accept bishops. Any cleric purportedly elected to the office and rank of Bishop of the Serbian Church by any persons, groups or corporations or other entities other than the Holy Assembly were not and are not validly elected to the office and rank of Bishop, their election was and is in each instance null and void. No one of them is or has ever has been a Bishop of the Serbian Church.

6. The Serbian Eastern Orthodox Diocese for the United States of America and Canada was created by the Holy Assembly in the early 1920's. Initially, Archimandrite Mardary was assigned to administer the affairs of the newly created diocese. On November 22, 1925, Mardary

was elected by the Holy Assembly as Diocesan Bishop for the diocese of the United States of America and Canada. Prior to his death Bishop Mardary caused the Illinois corporation to be formed. It was organized on May 10, 1935 pursuant to the Illinois Religious Corporations Act, ch. 32 pars. 46(a)-(k). It has the powers and obligations as are set forth and defined in the Diocesan Constitution, the Constitution of the Serbian Church and the Illinois Religious Corporations Act, as amended (Ill. Rev. Stats. 1971, pars. 176-187).

7. All assets, real, personal, tangible and intangible transferred by the Illinois religious corporation (and all those acting under and pursuant to its authority), were so transferred to the aforedescribed Illinois not-for-profit corporation, Shadeland Corporation and Jackson Corporation subject to, and impressed with, the trust imposed upon those assets. Those assets and all accretions and additions thereby to increase in value, income, earnings, or otherwise have at all times pertinent hereto been held (and are now, and must continue to be held) for the use and benefits of those persons in the United States and Canada faithful to the Serbian Church and to the Serbian Eastern Orthodox Diocese for the United States of America and Canada.

8. Dionisije was elected by the Holy Assembly in Belgrade, Yugoslavia, as Diocesan Bishop for the Serbian Eastern Orthodox Diocese for the United States of America and Canada in December, 1939. By virtue thereof he became and until suspended on May 10, 1963, served as the chief executive officer of the Illinois religious corporation, the Illinois not-for-profit corporation, the Priests' Pension Fund, the Shadeland Corporation, the Jackson Corporation, and the Diocesan Council. The Illinois religious corporation, the Illinois not-for-profit corporation, the

Shadeland Corporation, the Jackson Corporation, and the Priests' Pension Fund, are secular arms of the Serbian Eastern Orthodox Diocese for the United States of America and Canada. The Diocesan Council is the governing body of the Diocese for the United States of America and Canada.

9. On May 10, 1963 the Holy Synod suspended Dionisije. On July 27, 1963, the Holy Assembly removed and deposed Dionisije as Diocesan Bishop and on March 5, 1964, it defrocked him. These actions were valid, free and voluntary, binding ecclesiastical actions of the Holy Synod and Holy Assembly of the Serbian Church, taken wholly within their ecclesiastical power and authority. They were in no respect tainted with fraud, collusion, duress, or arbitrariness. Accordingly, they must be (and should have been) honored and accepted by defendants, and each of them, and, as well, given full force and effect by this and other secular courts of, and in, the United States and Canada, with regard to their effect, ecclesiastically and otherwise, on the possession, control and administration of church property.

10. Dionisije, having been validily suspended on May 10, 1963, and deposed and removed from his position as Diocesan Bishop for the Diocese of the United States of America and Canada on July 27, 1963, and defrocked as a Bishop of the Serbian Church on March 5, 1964, was without power or authority from and after May 10, 1963 to act as, or to exercise any of the rights, privileges, duties, powers or authorities, dejure or defacto, of Bishop of the Diocese. From and after July 27, 1963, the office of Bishop of the Diocese for the United States of America and Canada became and remained and still is vacant, as did and are the offices of chief executive officer of the

Illinois religious corporation, the Illinois not-for-profit corporation, the Priests' Pension Fund, the Jackson Corporation, the Shadeland Corporation and the Chairmanship of the Diocesan Council, as well as other offices and positions of the Diocese and of each of the above-listed corporations, held by the Bishop of the Diocese by virtue of his office as Bishop.

11. The office of Bishop for the Diocese of the United States of America and Canada being vacant, the Holy Assembly had exclusive authority to fill that vacancy. Upon the entry of the order of suspension and pending the final disposition of the suspension of Dionisje and his ultimate reassignment to his office or his removal therefrom by the Holy Assembly, the Holy Synod had exclusive authority to appoint an Administrator of that Diocese of the United States of America and Canada.

12. The Holy Synod, following Dionisije's suspension, validly appointed Bishop Firmilian as Administrator for the Diocese of the United States of America and Canada on May 10, 1963. By virtue of that appointment, Bishop Firmilian has since then been, and is, pending the election of a Diocesan Bishop to succeed him, the chief executive officer of the Illinois religious corporation, the Illinois not-for-profit corporation, the Priests, Pension Fund, and the Diocesan Council, responsible for the administration for the benefit of, and as trustee for those who are members of and who are faithful and who give allegiance to the Serbian Church and the Serbian Eastern Orthodox Diocese for the United States of America and Canada, of all of the assets tangible and intangible, real and personal, owned, held, controlled and operated by each of the aforedescribed entities. As Administrator, he has, and has had since his appointment on May 10, 1963, the powers, author-

ities, rights, duties, privileges, emoluments, immunities, offices and positions of the Administrator of the Diocese of the United States of America and Canada with the powers and subject to the limitations contained in the Constitutions of the Serbian Church and of the Serbian Eastern Orthodox Diocese for the United States of America and Canada.

13. Dionisije and those acting under his control and authority, have since May 10, 1963, illegally and improperly refused to recognize:

(i) the decisions of the Holy Assembly suspending, removing and defrocking Dionisije, and

(ii) the authority of Bishop Firmilian as Administrator for the Serbian Eastern Orthodox Diocese for the United States of America and Canada and as such, the holder of all offices and positions, rights, duties, powers, authorities, emoluments, immunities of Administrator, including, among others, the chief executive officership of the Illinois religious corporation, the Illinois not-for-profit corporation, the Priests' Pension Fund, and the Diocesan Council.

14. Bishop Firmilian's authority as Administrator of the Diocese for the United States of America and Canada is as set forth in the Constitutions of the Serbian Church and the Serbian Eastern Orthodox Diocese for the United States of America and Canada.

15. The Illinois religious corporation has full administrative freedom with relation to possession, use and control of its real and personal property, tangible and intangible, provided, however,

(i) that it may not change or amend the Diocesan Constitution without the approval of the Holy Assembly,

(ii) that all said real and personal property, tangible and intangible, has been during all times pertinent hereto, and still is and will remain, property held in trust to be administered for the benefit of those faithful in the United States and Canada who are faithful to the Serbian Church, and the Serbian Eastern Orthodox Diocese for the United States of America and Canada; and

(iii) the Illinois religious, Shadeland and Jackson Corporations and the Priests' Pension Fund may not employ any of their property contrary to the trust imposed thereon.

16. The changes and amendment to the Constitution of the Serbian Eastern Orthodox Diocese for the United States of America and Canada purportedly enacted subsequent to May 10, 1963, not having been approved by the Holy Assembly are null and void and without any force or effect, defacto or dejure.

17. By virtue of the authority conferred upon it by the Constitution of the Serbian Eastern Orthodox Diocese for the United States of America and Canada, the Diocesan Council has apparently managed all the temporal affairs of the Serbian Eastern Orthodox Diocese from May 10, 1963 to the present and there has been no evidence presented to this Court of any breach of the trust imposed upon the assets, or wrongdoing, with the assets of the Illinois religious corporation or Illinois not-for-profit corporation since May 10, 1963. The Court further finds that the financial and administrative matters conducted

by the Sabors since May 10, 1963 have apparently been in accordance with the Constitution of the Serbian Eastern Orthodox Diocese except to the extent that the Sabors purported to amend the Diocesan Constitution without the approval of the Holy Assembly of Bishops.

18. Absent the calling and holding of a Sabor pursuant to the Constitution of the Serbian Eastern Orthodox Diocese for the United States of America and Canada and appropriate actions of the Sabor, it was improper for the Holy Assembly to initiate or affect a division of reorganization of the entire Diocese for the United States of America and Canada and of the Illinois religious corporation into three new dioceses and, therefore the action of the Holy Assembly purporting to reorganize and divide the Serbian Eastern Orthodox Diocese into three new dioceses and to appoint a Diocesan Bishop of each of the new dioceses is invalid, null and void and of no force or effect, dejure or defacto.

19. Bishop Firmilian in his capacity as the Administrator of the Serbian Eastern Orthodox Diocese for the United States of America and Canada is authorized to do those acts permitted under the Serbian Church Constitution and the Constitution of the Serbian Eastern Orthodox Diocese for the United States of America and Canada and may undertake no action inconsistent with this decree or those Constitutions.

20. All Serbian Church congregations in the United States of America and Canada who profess loyalty to the Serbian Church with its Patriarchal See located in Belgrade, Yugoslavia, and the Serbian Eastern Orthodox Diocese for the United States of America and Canada with its Diocesan See located in Libertyville, Illinois, are members of the Serbian Eastern Orthodox Diocese for the

United States of America and Canada regardless of what position said churches may have taken with regard to the Serbian Church and the aforesaid Diocese from May 10, 1963 until the date of the entry of this Decree.

In view of the within and foregoing gindings and conclusions:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The decisions and actions of the Holy Assembly and the Holy Synod relating to the suspension, removal and defrockment of Dionisije were in no way tainted with fraud, collusion, duress, undue influence or arbitrariness. They were in all instances voluntary and legally authorized actions and they are valid, authorized and proper ecclesiastical decisions of the highest judicatories of the Serbian Church, and are in all respects binding upon this Court.

2. Bishop Firmilian was validly appointed by the Holy Synod to be and has been since his appointment on May 10, 1963 the Administrator of the Diocese for the United States of America and Canada in replacement of Dionisije. Until replaced by a Diocesan Bishop elected and assigned by the Holy Assembly, Bishop Firmilian possesses the authority, rights, duties, emoluments, privileges, immunities, offices and positions which are more particularly set forth in the Constitutions of both the Serbian Church and of the Serbian Eastern Orthodox Diocese for the United States of America and Canada.

3. The office of Bishop of the Serbian Eastern Orthodox Diocese for the United States of America and Canada is now and has been since July 27 1963 vacant. The Holy Assembly has the exclusive authority to fill that vacancy.

4. Defendants, and each of them, and all persons, firms, corporations and entities who have acted or who are acting under, with, or pursuant to their order or direction or in concert with them, are ordered to recognize Bishop Firmilian as the Administrator of the Serbian Eastern Orthodox Diocese for the United States of America and Canada and his authority as is set forth in the Constitutions of the Serbian Church and the Serbian Eastern Orthodox Diocese for the United States of America and Canada.

5. The Illinois religious corporation, has full administrative freedom within the entire political territory of the United States of America and Canada and it may independently regulate and rule the activities of its churches, schools and other diocesan institutions subject to the trusts hereinbefore set forth, and the Serbian Church with its See in Belgrade, Yugoslavia, other than having the power to approve or disapprove amendments to the Constitution of the Serbian Eastern Orthodox Diocese of the United States of America and Canada has no right or authority to interfere with the management of the property of the Serbian Eastern Orthodox Diocese.

6. Any purported changes or amendment to the Constitution of the Serbian Eastern Orthodox Diocese for the United States of America and Canada purportedly enacted subsequent to May 10, 1963 are null and void and do not now nor have they ever had any defacto or dejure force or effect.

7. The May 10, 1963 decision of the Holy Assembly of Bishops dividing the Serbian Eastern Orthodox Diocese for the United States of America and Canada into three new dioceses, was illegal, invalid and unenforceable because it is in violation of the Constitutions of the Serbian Church

and the Serbian Eastern Orthodox Diocese and all acts of the bishops and officers of the three new dioceses as alleged successors to the American-Canadian Diocese are null and void.

8. Dionisije has not been a Bishop of the Serbian Church since March 5, 1964, nor a Bishop of the Serbian Eastern Orthodox Diocese for the United States of America and Canada since July 27, 1963, nor, since May 10, 1963, the chief executive officer of the Illinois religious corporation, the Illinois not-for-profit corporation, the Shadeland Corporation, the Jackson Corporation, the Priests' Pension Fund, or the Diocesan Council, nor has he had authority since May 10, 1963 to exercise any ecclesiastical or administrative authority or power whatever with respect to the property or affairs of said corporations, Cuouncil and Fund or any committee or group associated with them.

9. The Court retains jurisdiction of this cause for the purpose of entering any further orders or decrees necessary, appropriate or desirable in order to execute, inforce and carry out this Decree.

10. The court costs in this consolidated cause shall be calculated by the Clerk of Court, assessed and paid one-half by plaintiffs as a group and one-half by defendants as a group.

11. Nothing shall delay the enforcement or appeal of this decree.

ENTER:

/s/ L. ERIC CAREY

Dated: April 30, 1973.
ENDORSED:
"FILED APR 30 73
"Stephanie Sulthin, CLERK."